

POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

THOMAS H. ANDERSON and  
JOAN M. HETT,

Appellants,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY; and  
OLHAVA ASSOCIATES,

Respondents,

and

WAL-MART STORES, INC.

Intervenor.

PCHB NO. 03-120 & 03-123

*Consolidated with*

---

RICHARD C. BOUGHNER,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY;  
MARK ZENGER; and  
OLHAVA ASSOCIATES,

Respondents,

and

WAL-MART STORES, INC.

Intervenor.

PCHB NO. 03-129

ORDER GRANTING  
MOTION TO DISMISS  
FOR MOOTNESS

1 This case arises from the Department of Ecology's (Ecology) grant of coverage under a  
2 general stormwater permit to Olhava Associates (Olhava) for construction activities associated  
3 with developing a 20.2-acre site that will be used for a Wal-Mart. The current issue before the  
4 Board is the Motion to Dismiss for Mootness filed by Olhava and Mark Zenger. The Motion to  
5 Dismiss is based upon Olhava's decision to postpone the sale of the 20.2-acre parcel until after  
6 the improvements to the proposed Wal-Mart site have been constructed. Olhava contends this  
7 eliminates the need for separate NPDES permit coverage for the 20.2-acre parcel because permit  
8 coverage had been previously granted to them for a 215-acre site, which includes the 20.2-acre  
9 parcel. Ecology cancelled the separate NPDES permit coverage for this smaller parcel at Olhava  
10 Associates' request. The Appellants object to the dismissal of the case.

11  
12 Robert D. Johns represents Olhava and Mark Zenger. Courtney E. Flora and John C.  
13 McCullough represent Wal-Mart. Richard C. Boughner, Joan M. Hett and Thomas H. Anderson  
14 are all acting *pro se*. Ecology took no active role in this motion to dismiss. Board members  
15 William H. Lynch, presiding, Bill Clarke, Chair, and David W. Danner deliberated these  
16 motions. No oral argument was presented on these motions. After the motion to dismiss was  
17 filed, and the Board received a response and reply to the motion, the Board received a letter and  
18 attachments from Ms. Hett providing additional information she wished the Board to consider.  
19 The Respondents provided supplemental statements to the Board based upon this additional  
20 material from Ms. Hett.

21 In considering the motion the Board reviewed the following material:

PCHB NOS. 03-120, 123, & 129  
ORDER GRANTING MOTION  
TO DISMISS

1. Olhava Associates and Mark Zenger's Motion to Dismiss for Mootness, including Olhava's Request to Cancel Coverage under the Stormwater General Permit for Construction Activity (Permit #SO3-005412), and Ecology's Notice of Termination of Coverage.
2. Declaration of Mark Zenger in Support of Motion to Dismiss for Mootness.
3. Wal-Mart's Response to Olhava's Motion to Dismiss for Mootness.
4. Appellant Thomas H. Anderson's Response to Olhava's Motion to Dismiss for Mootness.
5. Appellant Richard C. Boughner's Response to Motions to Dismiss for Mootness and Attachments 1-8.
6. Appellant Joan M. Hett's Response to Motions to Dismiss for Mootness and Attachments A-E.
7. Olhava's Reply Brief in Support of Motion to Dismiss for Mootness.
8. Appellant Joan M. Hett's July 25, 2005 letter to the Board with attachments.
9. Supplemental Statement of Olhava Associates Regarding Motion to Dismiss for Mootness.
10. Respondent Wal-Mart's August 10, 2005 letter to the Board.
11. Materials submitted in relation to the Board's May 21, 2004, Order Denying and Granting the Motion to Dismiss and Order Denying the Motion in Limine (1st Motion to Dismiss).

#### DISCUSSION

The Board grants the Motion to Dismiss for Mootness because there is no active stormwater permit on appeal before the Board and the Board is unable to grant any effective relief. Although the courts and the Board will apply an exception from dismissing moot cases for matters of continuing and substantial public interest under certain circumstances, the Board

1 does not find this limited exception to be applicable in this case.

2 FACTS<sup>1</sup>

3 (1)

4 The proposed Olhava project, known as the Olhava Integrated Master Plan, is located in  
5 the City of Poulsbo and consists of a mixed commercial, business park, college campus, and  
6 residential uses. The project site consists of approximately 215 acres. It will provide  
7 approximately 840,000 square feet of commercial space, 325,000 square feet of business park  
8 space, 50,000 square feet for a branch campus of Olympic Community College, 70 single-family  
9 homes, and 420 multi-family housing units. *Declaration of Mark Zenger.*

10 (2)

11 On February 12, 2002, Olhava applied to Ecology for coverage under the National  
12 Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permit for  
13 Stormwater Discharges Associated with Construction Activities (General Stormwater Permit) for  
14 construction activity on the 215-acre site.<sup>2</sup> Notice of the application for coverage was published  
15 in the Bremerton Sun on February 19 and February 26, 2002. *Declaration of Mark Zenger.*  
16  
17  
18

---

19 <sup>1</sup> More detailed facts regarding this project are contained in the Board's Order pertaining to the 1<sup>st</sup> Motion to Dismiss.

20 <sup>2</sup> Ecology issued the General Stormwater Permit for Construction Activities on October 4, 2000. The General  
21 Stormwater Permit is used in lieu of issuing individual permits to each discharger within this point source category. Construction activities, which result in the disturbance of five or more acres of land and also discharge stormwater to surface water or a storm drain must obtain coverage under the permit. Special Condition S2.B, General Stormwater Permit. 1<sup>st</sup> Motion to Dismiss, Wal-Mart Motion to Dismiss, Ex. A.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
(3)

Ecology granted coverage under the General Stormwater Permit to Mark Zenger of Olhava Associates for the 215-acre site on June 5, 2002 (Permit S03-004675). Permit S03-004675 was not appealed. Ecology's letter extending coverage to this site notes Dogfish Creek is listed on the 303(d) list as an impaired water body for turbidity. Ecology also attached an order requiring monitoring of stormwater discharging from the Olhava site to Dogfish Creek for the duration of the project. *1st Motion to Dismiss, Declaration of Mark Zenger, Ex. 3.*

(4)

The notice for coverage of the 215-acre site indicates a series of techniques will be utilized to reduce soil erosion and sedimentation impacts and control stormwater flows. Infiltration ponds with separate water quality control facilities are identified as the primary method of stormwater control. Some discharges and/or overflow from the system may occur at the natural, pre-existing locations at rates that are equal to or less than the pre-developed flow rates. Approximately 80 acres of the site will discharge stormwater into Johnson Creek; the remaining acres will discharge into Dogfish Creek. The stormwater discharges eventually reach Liberty Bay, approximately one-half mile from the closest point of the site. *1st Motion to Dismiss, Declaration of Mark Zenger, Ex. 1.*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
(5)

On March 11, 2003, Olhava applied for site development approval from the City of Poulsbo for construction of the proposed Wal-Mart on a 20.2-acre parcel located in the western portion of the 215-acre Olhava property. *1st Motion to Dismiss, Declaration of Mark Zenger at 4.* The proposed Wal-Mart site was previously wooded and vacant, except for some decommissioned NIKE missile silos. The proposed Wal-Mart site was rough graded for development under a grading permit issued by the City on June 11, 2002. *1st Motion to Dismiss, City Council Findings, Conclusions and Decision at 3, Declaration of Courtney E. Flora in Support of Motion to Dismiss, Ex. A.*

(6)

The proposed Wal-Mart project consists of the construction of an approximately 218,000 square foot building and parking for 1,024 cars in two phases. The first phase consists of approximately 150,000 square feet of retail and auto service area space. The second phase adds approximately 68,000 square feet of retail area. *1st Motion to Dismiss, City Council Findings, Conclusions and Decision at 3*

1  
2  
3 (7)  
4

5 Because General Stormwater Permit No. S03-004675 contains a condition, which  
6 prohibits the assignment of rights under the permit if there is a partial sale of the property,  
7 Olhava applied to Ecology on April 22, 2003, for coverage under a second general permit. The  
8 application for coverage under the second general permit was limited to the 20.2-acre parcel  
9 associated with the proposed Wal-Mart. On August 11, 2003, Ecology issued coverage under  
10 the General Stormwater Permit to Olhava for construction activity on this 20.2-acre site (Permit  
11 S03-005412). *Declaration of Mark Zenger.*  
12

13 (8)  
14

15 Three separate appeals were filed with the Board challenging Permit S03-005412, which  
16 provided coverage for the 20.2-acre parcel under the General Stormwater Permit, and the cases  
17 were consolidated. The Board issued an order on September 30, 2003, granting Wal-Mart's  
18 motion to intervene in these appeals.  
19  
20  
21

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

(9)

On May 21, 2004, the Board issued an Order Denying and Granting Motions to Dismiss and Denying a Motion in Limine. In the May 21<sup>st</sup> order, the Board dismissed the issue regarding the adequacy of notice for Permit S03-004675, which provided coverage under the General Stormwater Permit for the 215-acre site in 2002. The Board also refused to dismiss the issues regarding stormwater infrastructure and best management practices associated with stormwater discharges from the proposed Wal-Mart site, even if they were not located on that 20.2-acre parcel.

(10)

Subsequent to the Board's order in May 2004, Olhava and Wal-Mart re-negotiated their agreement so that Olhava, rather than Wal-Mart, would construct the improvements associated with the proposed Wal-Mart store. Olhava and Wal-Mart believed this new arrangement would allow the construction work to be completely controlled by the original General Stormwater Permit No. S03-004675. On April 18, 2005, Olhava requested Ecology to cancel General Stormwater Permit No. S03-005412 for the 20.2-acre site. *Declaration of Mark Zenger, Ex. 1.*

(11)

On or about May 19, 2005, Ecology granted Olhava's request to terminate General Stormwater Permit No. S03-005412. *Declaration of Mark Zenger, Ex. 2.*



1 (12)

2 On May 20, 2005, Olhava and Mark Zenger filed a Motion to Dismiss for Mootness with  
3 the Board. On June 3, 2005, Wal-Mart filed a response to the Board joining in the Motion to  
4 Dismiss for Mootness. Ecology indicated it would not be taking an active part in the case. The  
5 Appellants, all of whom filed responses, oppose the Motion to Dismiss for Mootness.

6 (13)

7 Before the Board issued its decision on this motion, Petitioner Joan Hett filed a  
8 supplemental statement with the Board on August 1, 2005. This document, dated July 25, 2005,  
9 expressed concerns about the abandoned Nike Missile site on the Olhava property. She noted  
10 that sampling at some other former missile sites indicated the presence of possible carcinogenic  
11 chemicals, and that there have been four recent cancer deaths from homes located near the site,  
12 all of which obtained their drinking water from shallow wells. Olhava filed a supplemental  
13 statement with the Board on August 11, 2005, in response to Ms. Hett's supplemental statement.

14  
15 ANALYSIS

16 (1)

17 A motion to dismiss has been filed. It is the type of motion envisioned by CR 12,  
18 and made applicable here by WAC 371-08-300. "If, on a motion for judgment on the  
19 pleadings, matters outside the pleading are presented to and not excluded by the court, the  
20 motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and  
21 all parties shall be given reasonable opportunity to present all material made pertinent to such a

1 motion by rule 56." CR 12(c). Accordingly, the analysis will proceed in a manner similar to a  
2 motion for summary judgment.

3 (2)

4 Summary judgment is designed to do away with unnecessary trials when there is no  
5 genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975). A  
6 material fact is one upon which the outcome of the litigation depends. *Jacobsen v. State*, 89  
7 Wn.2d 104, 569 P.2d 1152 (1977). In a summary judgment proceeding, the moving party has  
8 the initial burden of showing there is no dispute as to any material fact. *Hiatt v. Walker*  
9 *Chevrolet*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). If the moving party has met its burden of  
10 producing factual evidence showing it is entitled to judgment as a matter of law, the burden  
11 shifts "to the nonmoving party to set forth facts showing there is a genuine issue of material  
12 fact." *Hash v. Children's Orthopedic Hosp.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

13 (3)

14 The non-moving party must "set forth specific facts showing there is a genuine issue for  
15 trial." *LaPlante v. State*, 85 Wn. 2d at 158. A non-moving party may not oppose a summary  
16 judgment motion by nakedly asserting there are unresolved factual questions. *Bates v. Grace*  
17 *United Meth. Church*, 12 Wn. App. 111, 115, 529 P.2d 466 (1974).

18 (4)

19 In ruling on a motion for summary judgment, the Court must consider all of the material  
20 evidence and all inferences therefrom in a manner most favorable to the non-moving party and,  
21 when so considered, if reasonable persons might reach different conclusions, the motion should

1 be denied. *Wood v. Seattle*, 57 Wn.2d 469, 358 P.2d 140 (1960); *Weatherbee v. Gustafson*, 64  
2 Wn. App. 128, 822 P.2d 1257 (1992). Summary judgment may be granted to the nonmoving  
3 party. *Impecoven v. Dept. of Revenue*, 120 Wn.2d 357, 365 (1992).

4 (5)

5 The basis for Olhava's Motion to Dismiss for Mootness is that there is currently no active  
6 stormwater permit on appeal before the Board. Ecology granted Olhava's request to terminate  
7 General Stormwater Permit No. S03-005412 because there is no longer a partial transfer in  
8 ownership of the 215-acre site. All construction work is being conducted pursuant to General  
9 Stormwater Permit No. S03-004675, which is a valid permit that was never appealed to the  
10 Board. WAC 173-226-190 requires challenges to coverage under a general NPDES permit to be  
11 filed within thirty days of its issuance. Coverage under the General Permit for the 215-acre site  
12 near Poulsbo was issued on June 5, 2002. In summary, General Stormwater Permit No. S03-  
13 005412 no longer exists and the appeal period for Permit No. S03-004675 has expired.<sup>3</sup>

14 (6)

15 In response to Olhava's Motion to Dismiss, Appellant Thomas Anderson asserts that  
16 although the 20.2-acre site has not yet been sold to Wal-Mart, it is the clear intent of the parties  
17 to transfer this parcel to Wal-Mart. He states:

18 The building permit for construction and the construction is being done to Wal-  
19 Mart specifications and under Wal-Mart supervision. Thus the intent to dismiss for  
20 mootness is not applicable and only indicates that the respondents are attempting to  
negate the intent of the permit by delaying legal transfer of ownership of the property.

---

21 <sup>3</sup> The Board previously ruled in the May order that challenges to General Stormwater Permit No. S03-004675 were untimely.

1 *Anderson Request Not to Grant Motion to Dismiss for Mootness, p.1.*

2  
3 (7)

4 The argument advanced by Appellant Anderson that Olhava and Wal-Mart are attempting  
5 to negate the intent of the permit is not well taken. Coverage under a second general permit in  
6 this case was initially required because Olhava planned on selling the 20.2-acre parcel to Wal-  
7 Mart prior to the improvements to the property. Because Wal-Mart would be disturbing more  
8 than five acres of land and discharging stormwater to surface water or a storm drain, Wal-Mart  
9 was required to seek coverage under the General Stormwater Permit or an individual stormwater  
10 discharge permit. *Permit S03-004675, at p. 3; Special Condition S2.B, General Stormwater*  
11 *Permit.* The purpose of the limited transferability of permit coverage is to ensure that the person  
12 who obtains a permit to develop a site will be subject to the conditions of the appropriate permit.

13 (8)

14 In the present case, Olhava obtained the permit coverage and is responsible for  
15 developing the site according to all of the conditions of that permit. Furthermore, the coverage  
16 extended under both Permit No. S03-004675 and Permit No. S03-005412 is identical. Permit  
17 No. S03-005412 did not contain additional conditions that pertained to the development of the  
18 20.2 acres. The General Permit provides that Ecology will not consider coverage for any facility  
19 when all the treatment and stormwater discharges are already covered under an existing permit.  
20 *Special Condition S2.D.4, General Stormwater Permit.*

1 (9)

2 Appellant Anderson states that the Appellants were not provided any official notification  
3 that the request to cancel coverage was made or granted until about May 19, 2005, even though  
4 an appeal was pending. There is no legal requirement for the Respondents to notify the  
5 Appellants they were restructuring their arrangement so that a second general permit would no  
6 longer be required. This assertion does not constitute a valid ground for not dismissing the  
7 appeal.

8 (10)

9 Appellant Joan M. Hett asserts that Ecology did not adequately address the public's  
10 concerns about this project because they turned concerns about the project over to the developer  
11 to answer. She states that many of the concerns she raised went unanswered. Appellant Hett has  
12 not cited any legal authority that requires Ecology to provide a response to people who raise  
13 concerns over an application for coverage under a general discharge permit. This assertion does  
14 not constitute a ground for not dismissing the appeal.

15 (11)

16 Appellants Boughner and Hett raise the adequacy of public notice provided for General  
17 Permit No. S03-004675. They contend if the notice was published in the North Kitsap Herald,  
18 which is the official newspaper for the City of Poulsbo, rather than the Bremerton Sun, the  
19 general public would have had an opportunity to provide comments on the project and to appeal  
20 the issuance of this permit. The Board previously granted the Respondents' motion to dismiss  
21 this issue from the case regarding the adequacy of the notice for the 2002 permit because it was

1 not timely raised. *Order Denying and Granting Motion to Dismiss and Order Denying Motion*  
2 *in Limine*, p. 20-21.

3 (12)

4 Appellants Boughner and Hett raise concerns about Olhava's practices at the site, the  
5 design of some of the features at the site, and Ecology's ability to enforce the terms of the  
6 permit. Appellant Anderson also contends the present stormwater system has serious flaws.  
7 These concerns raise issues about enforcement of the permit and whether an individual permit  
8 should have been issued rather than coverage under the General Stormwater Permit. Neither of  
9 these issues is appropriately before the Board at this time.

10 (13)

11 The opportunity to contest the appropriateness of extending general coverage to this site  
12 pursuant to Permit S03-004675 has long since expired. Ecology issued this permit on June 5,  
13 2002. As discussed earlier, WAC 173-226-190 requires challenges to coverage under a general  
14 NPDES permit to be filed within thirty days of its issuance.

15 (14)

16 In addition, appeals of general permit coverage to any individual discharger are "limited  
17 to the general permit's applicability or inapplicability to that individual discharger."<sup>4</sup> WAC 173-  
18 226-190. RCW 43.21B.110, which provides the Board's jurisdiction, does not list the vigilance  
19 of enforcement by Ecology as an issue that may be appealed to the Board. The Board, as an  
20 administrative review board, only has the jurisdiction that has been conferred by statute. *Inland*

1 *Foundry Co. v. Spokane County Air Pollution Control Authority*, 98 Wn. App. 121, 124 969 P.2d  
2 102, reconsideration denied, 141 Wn.2d 1007, 10 P.3d 1073. Therefore, this issue is outside the  
3 scope of challenges that may be brought to this Board regardless of the timeliness of the appeal.

4 (15)

5 If water quality violations do occur at this site, neither Ecology nor the Appellants are  
6 powerless to compel compliance with the law. The General Stormwater Permit itself contains  
7 the requirement for the permittee to comply with state water quality standards, sediment  
8 management standards, and human health based criteria. The permittee is required to take  
9 immediate action to achieve compliance when construction sites fail to meet the applicable  
10 standards. *Special Condition S5, General Stormwater Permit*. Ecology may issue an  
11 enforcement order or a civil penalty for water quality violations. *RCW 90.48.142 and 90.48.144*.  
12 It may also decide at any time that an individual permit is required. *Cascade Conservation*  
13 *League v. Ecology et. al*, p. 16, *PCHB No. 98-82 (1999)(Final Findings of Fact, Conclusions of*  
14 *Law and Order)*. WAC 173-226-250(1) authorizes Ecology to sue in court to enjoin any  
15 threatened or continuing violations of any general permits or conditions of those permits without  
16 the necessity of prior revocation of coverage under the general permit. WAC 173-226-250(4)  
17 and (5) also authorize Ecology to seek criminal sanctions with the assistance of the local  
18 prosecuting attorney under certain circumstances.

---

21 <sup>4</sup> See *Cascade Conservation League v. Ecology, et al.*, (PCHB No. 98-82)(Order Granting and Denying Summary Judgment)((December 31, 1998).

1 (16)

2 In addition to sanctions, WAC 173-226-240(1) authorizes the Director of Ecology to  
3 terminate coverage under a general permit for cause. Instances where coverage could be  
4 revoked include (a) violation of any term or condition of the general permit, and (d) a  
5 determination that the permitted activity endangers human health, safety, or the environment, or  
6 contributes to water or sediment quality standards violations. Condition G6 of the General  
7 Stormwater Permit also provides “Revocation of coverage under a general permit may be  
8 initiated by Ecology or requested by any interested person.” WAC 173-226-240(3) also  
9 authorizes any person to petition the director to require a discharger covered by a general permit  
10 to apply for and obtain an individual discharge permit.

11 (17)

12 Appellant Boughner has asked the Board to revoke the coverage for Olhava under the  
13 General Stormwater Permit. The process for revoking coverage under a general permit is not a  
14 model of clarity. The Board believes the Appellant must first make this request to Ecology. If  
15 Ecology fails to revoke the coverage, the remedy is to file an action in superior court pursuant to  
16 RCW 34.05.570((4)(b)). This section of the Washington Administrative Procedures Act specifies  
17 how a person whose rights are violated by an agency’s failure to perform a duty required by law  
18 seeks relief. It appears the Appellants would need to show the failure of Ecology to revoke  
19 coverage is arbitrary and capricious. *See RCW 34.05.570(4)(c)*. The Board’s authority is  
20 largely limited to reviewing decisions made by Ecology and other agencies under RCW  
21 43.21B.110. It appears inconsistent with that authority for this Board to make the initial decision



1 to revoke coverage under a general permit, although the Board would review the appeal of a  
2 permittee whose coverage under a general permit is revoked. The Board therefore cannot  
3 provide the relief requested of revoking coverage under the general permit.

4 (18)

5 Appellant Joan M. Hett expresses concerns in her response that the sampling at the site  
6 by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency (EPA)  
7 occurred before 1997. She supports her concern with an article appearing in the Seattle Post-  
8 Intelligencer on October 29, 2003. This article states that perchlorate first became a concern in  
9 1997 when technologies developed to allow detection of this chemical at extremely low levels.  
10 The article indicates that experts from EPA were concerned about how this chemical could cause  
11 thyroid problems in people, and particularly in fetuses. This same article indicates that scientists  
12 from the Defense Department, NASA, and the military industry believe EPA's analysis was  
13 flawed and overly cautious.

14 (19)

15 Ms. Hett raises additional concerns regarding the need for additional sampling at the site  
16 in her letter dated July 25, 2005. She notes that perchlorate and nitrosodimethylamine have been  
17 found at some former missile sites in the country, and that these are included in WAC 173-303-  
18 9905 as dangerous waste. She also states that these chemicals could be carcinogenic. Finally,  
19 Ms. Hett states that four people who live near the site with shallow wells have died in the past  
20 two years.

1 (20)

2 The concerns raised by Ms. Hett lack the sufficiency required for evidence. There is no  
3 record evidence that these chemicals are on the site, or that there is a link between the deaths of  
4 the four individuals with groundwater contaminated from the site. In addition, the appeal  
5 pertains to coverage under the General Stormwater Permit. The Appellants do not want the case  
6 to be dismissed because they want an opportunity to raise their concerns about the stormwater  
7 practices and facilities at the site, and how improper practices could lead to a connection with  
8 contaminated groundwater at the site. Ecology's cancellation of Permit No. S03-005412 would  
9 normally make the case moot on its face, but the Board also analyzed whether the public interest  
10 exemption from mootness was applicable.

11 (21)

12 A case is moot if a court can no longer provide effective relief. *Orwick v. Seattle*, 103  
13 Wn.2d 249, 253, 692 P.2d 793 (1984); *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983).  
14 The courts will generally not review a case that has become moot because of the danger of an  
15 erroneous decision being issued caused by the failure of the parties to zealously advocate their  
16 position. An exception can be made, however, for moot cases involving "matters of continuing  
17 and substantial public interest." *Orwick*, at 253; *Sorenson v. Bellingham*, 80 Wn.2d 547, 558,  
18 496 P.2d 512 (1972). The criteria for deciding whether a case, although moot, is reviewable  
19 under the substantial public interest test are: (1) whether the issue is of a public or private  
20 nature, (2) whether an authoritative determination is desirable to provide future guidance to  
21 public officers, and (3) the likelihood the issue will recur in the future.

1 (22)

2 The Washington Supreme Court discussed the use of this exception by the Washington  
3 appellate courts in *Hart v. DSHS*, 111 Wn.2d 445, 448-50, 759 P.2d 1206 (1988). In *Hart*, the  
4 Court expressed concern about the increasing use of this exception without rigorous application  
5 of the *Sorenson* criteria to the facts of cases, and that the increased used of the exception  
6 threatens to swallow the basic rule of not issuing decisions in moot cases. *Hart at 450*.

7 (23)

8 Decisions involving the interpretation of the constitution, statutes, and regulations tend to  
9 present issues which are more public in nature, are likely to arise again, and provide needed  
10 guidance to public officers. *Hart at 449*. The appeal needs to address the public at large rather  
11 than a specific community. *Harvest House Restaurant v. Lynden*, 102 Wn.2d 369, 685 P.2d 600  
12 (1984).

13 (24)

14 The Appellants have raised serious concerns about groundwater contamination at this  
15 site, and that this contamination may come into contact with surface water if stormwater controls  
16 prove to be inadequate. However, the Board is unable to conclude that the public interest  
17 exception applies in this case. The Appellants may seek relief in other forums where a remedy  
18 is more appropriately provided. This distinguishes this appeal from cases brought before courts  
19 of general jurisdiction with much greater equitable remedies. Second, although this is an appeal  
20 with a potentially large impact on the parties and the surrounding community, it does not meet  
21 the criteria for the public interest exception as discussed by the Supreme Court in *Hart*. This

1 case does not involve the interpretation of the constitution, a statute, or a regulation, and will not  
2 provide guidance to the conduct of public officials. The appeal is in the nature of a dispute  
3 between private parties.

4 (25)

5 In the present case the Board is unable to direct Ecology to rescind coverage under the  
6 General Stormwater Permit. The Board is also unable to direct Ecology to take an enforcement  
7 action. The time for contesting General Stormwater Permit No. S03-004675 has expired and  
8 Permit No. S03- 005412 no longer exists. There are no active permits before the Board to  
9 consider. The Appellants have been unable to show that the Board can grant meaningful relief.  
10 For these reasons dismissal of case based upon mootness is appropriate. *Helping Homes*  
11 *Development Corp., et al. v. Ecology and the City of Kalama*, PCHB No. 02-079 & 02-080  
12 (Order Granting Summary Judgment)(2002). The public interest exception to mootness, as  
13 discussed above, is not applicable in this case.

14 (26)

15 The Board finds it is also appropriate to grant the motion on mootness because issues  
16 related to Ecology's enforcement of permit conditions or the laws, and actions to compel  
17 Ecology to revoke coverage under a general permit, are not appealable to this Board. Instead,  
18 the proper forum to bring these actions is superior court. Therefore, this is not a situation where  
19 the Board would still have the project before it under some future appeal. Any remedies  
20 provided to the Appellants must come from state or federal agencies or the superior courts.

1 ORDER

2 The Board GRANTS the Motion to Dismiss for Mootness.

3 SO ORDERED this 16<sup>th</sup> day of September 2005.

4  
5 **POLLUTION CONTROL HEARINGS BOARD**

6 WILLIAM H. LYNCH, Presiding

7 BILL CLARKE, Chair

8 DAVID W. DANNER, Member